



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

March 17, 2004

Mr. Ollie Grant
Chief Appraiser
Nueces County Appraisal District
201 North Chaparral
Corpus Christi, Texas 78401

OR2004-2004

Dear Mr. Grant:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 197711.

The Nueces County Appraisal District (the "district") received a request for information related to a particular disability exemption and the district's guidelines for granting such exemptions. You indicate that the district's guidelines have been released to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.102, and 552.140 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that other statutes make confidential. You claim that the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8, governs the submitted information.

At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. See Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health

Information, 45 C.F.R. Pts. 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office recently addressed the interplay of the Privacy Rule and the Act. Open Records Decision No. 681 (2004). In that decision, we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted that the Act "is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public." *See* Open Records Decision No. 681 at 8 (2004); *see also* Gov't Code §§ 552.002, .003, .021. We therefore held that the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. Open Records Decision No. 681 at 9 (2004); *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the district may withhold requested protected health information from the public only if an exception in subchapter C of the Act applies.

You also assert section 11.12 of the Tax Code and article 8, section 2 of the Texas Constitution as exceptions to disclosure of the information at issue. We note, however, that while both section 11.12 and article 8, section 2 provide for certain property tax exemptions, neither expressly makes information confidential. *See* Tex. Const. Art. VIII, § 2(b) (Legislature may exempt property owned by disabled veteran); Tax Code § 11.12 (property exempt from ad valorem taxation by federal law exempt from taxation). In order for section 552.101 to apply, a statute must contain language expressly making certain information confidential. *See* Open Records Decision Nos. 658 at 4 (1998), 478 at 2 (1987), 465 at 4-5 (1987). Confidentiality cannot be implied from the structure of a statute or rule. *See* Open Records Decision No. 465 at 4-5 (1987). Accordingly, the district may not withhold any portion of the submitted information from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 11.12 of the Tax Code or article 8, section 2 of the Texas Constitution.

Next, you claim that the information at issue is subject to the Medical Practices Act ("MPA"). *See* Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). Based upon our review of the records at issue, however, we find that no portion of the submitted information consists of medical records. Thus, the MPA is inapplicable to the submitted information.

You further claim that the remaining requested information is subject to the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g.¹ Section 552.026 of the Government Code incorporates FERPA into chapter 552 of the Government Code. See Open Records Decision No. 634 at 6-8 (1995). Section 552.026 provides:

[t]his chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov't Code § 552.026. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain numerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. See 20 U.S.C. § 1232g(b)(1). "Education records" are those records, files, documents, and other materials which

(i) contain information directly related to a student; and

¹FERPA is incorporated into the Act by section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101.

(ii) are *maintained by an educational agency or institution* or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(A) (emphasis added). We note that the district is not an educational agency or institution attended by students. Consequently, the information that you seek to withhold is not an "education record" as defined by FERPA. *See* Open Records Decision No. 390 (1983). Accordingly, we conclude that FERPA is inapplicable to the submitted information and it may not be withheld from the requestor on that basis.

We next address your claim under section 11.48 of the Tax Code, which provides in pertinent part:

(a) A driver's license number, personal identification certificate number, or social security account number provided in an application for an exemption filed with a chief appraiser is confidential and not open to public inspection. The information may not be disclosed to anyone other than an employee of the appraisal office who appraises property, except as authorized by Subsection (b).

(b) Information made confidential by this section may be disclosed:

- (1) in a judicial or administrative proceeding pursuant to a lawful subpoena;
- (2) to the person who filed the application or to the person's representative authorized in writing to receive the information;
- (3) to the comptroller and the comptroller's employees authorized by the comptroller in writing to receive the information or to an assessor or a chief appraiser if requested in writing;
- (4) in a judicial or administrative proceeding relating to property taxation to which the person who filed the application is a party; or
- 5) if and to the extent the information is required to be included in a public document or record that the appraisal office is required by law to prepare or maintain.

Tax Code § 11.48(a), (b). The submitted documents contain a social security number provided in an application for an exemption. You do not indicate, nor does it appear to this

office, that any of the release provisions of section 11.48(b) apply in this instance. Thus, the social security number is confidential under section 11.48, and must be withheld pursuant to section 552.101 of the Government Code.

Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683; *see also*, Open Records Decision Nos. 470 (concluding that fact that person broke out in hives as result of severe emotional distress is excepted by common-law privacy), 455 (1987) (concluding that kinds of prescription drugs person is taking are protected by common-law privacy), 422 (1984) (concluding that details of self-inflicted injuries are presumed protected by common-law privacy), 343 (1982) (concluding that information regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions/seizures, or emotional/mental distress is protected by common-law privacy).

In prior decisions, we have determined that financial information relating only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See, e.g.*, Open Records Decision Nos. 545 at 4 (1990) general has found kinds of financial information not excepted from disclosure by common-law privacy to be those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis). We have marked the portions of the submitted information that the district must withhold under section 552.101 of the Government Code in conjunction with the common-law right of privacy.

You also assert that the remaining requested information is excepted from disclosure pursuant to section 552.102 of the Government Code. Section 552.102(a) excepts from disclosure "[i]nformation in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Gov't Code § 552.102(a). Section 552.102(b) excepts from disclosure "a transcript from an institution of higher education maintained in the personnel file of a professional public school employee[.]" Gov't Code § 552.102(b). Section 552.102 is applicable only to information contained in the

personnel file of an employee of a governmental body. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.--Austin 1983, writ ref'd n.r.e.); *see also* Open Records Decision Nos. 473 at 3 (1987), 444 at 3-4 (1986), 423 at 2 (1984). You have failed to demonstrate that the submitted information is maintained in the personnel file of a governmental employee. Accordingly, we conclude that section 552.102 of the Government Code is inapplicable to the submitted information and that it may not be withheld from the requestor on that basis.

Finally, you assert that the submitted documents include forms governed by section 552.140 of the Government Code, which provides that a military veteran's Department of Defense Form DD-214 or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003 is confidential for a period of seventy-five years and may only be disclosed in accordance with section 552.140 or in accordance with a court order. Gov't Code § 552.140(a), (b). Based upon our review of the records at issue, however, we find that no portion of the submitted information consists of military discharge records. Thus, section 552.140 is inapplicable to the submitted information.

In summary, the marked social security number is confidential under section 11.48, and must be withheld pursuant to section 552.101 of the Government Code. We have marked the portions of the submitted information that the district must withhold under section 552.101 of the Government Code in conjunction with the common-law right of privacy. The remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public

records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877)673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512)475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 197711

Enc. Submitted documents

c: Mr. Mel Miller
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(w/o enclosures)